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NO. 84-212 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

INTERNATIONAL HARVESTER COMPANY,

Petitioner,

vs.

ROBERT C. WASSON, CHAIRMAN, CHARLES N. PLOWDEN AND JOHN H. LAFITTE, JR., CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the imposition by South Carolina of a sales tax upon the sale of trucks violate Article 1, Section 8 of the United States Constitution (Commerce Clause) where the orders for the trucks were solicited in South Carolina by a seller maintaining a resident salesman and retail outlets in South Carolina and where delivery was made in South Carolina by delivering the trucks to a branch of the seller within South Carolina?

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Utah Tax Commission v. Pacific States Pipe
Co., 372 U. S. 605, 83 S. Ct. 925 (1963) .. 7, 10, 11

OPINION AND ORDER IN PRIOR PROCEEDINGS

The opinion and order in prior court proceedings have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

JURISDICTION

This Honorable Court is being asked to accept jurisdiction of this matter under 28 U. S. C. 1257(3). Although this matter may be technically within 28 U. S. C. 1257(3), the granting of a review on Writ of Certiorari is a matter of judicial discretion and should be granted only where there are special and important reasons. There are no such reasons in the instant case since the applicability of a sales tax to sales resulting from orders solicited in the taxing state by a resident salesman of the taxing state has been confirmed by this Court in prior opinions. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33,

60 S. Ct. 388, 84 L. Ed. 565 (1940) and International Harvester Co. v. Department of Treasury, 322 U. S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313 (1944). The South Carolina Supreme Court has decided the issue in compliance with the United States Supreme Court's decisions and jurisdiction should be denied.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Constitutional Provision

The Commerce Clause, Article 1, Section 8, Clause 3:

> "The congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes; * * * ."

State Statutes

1. Section 12-35-510:

> "In addition to all other licenses, taxes and charges imposed, there is levied for the support of public schools of the State, upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character (not including, however, bonds or other evidences of debt or stocks), an amount equal to four

percent of the gross proceeds of sales of the business."

2. Section 12-35-20:

"The word 'business' shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit benefit or advantage, either direct or indirect, and not excepting subactivities producing marketable commodities used or consumed in the main business activity, each of which subactivities shall be considered business engaged in, taxable in the class in which it falls."

3. Section 12-35-110:

"The terms 'sale at retail' and 'retail sale' shall mean all sales of tangible personal property except those defined in this article as wholesale sales. * * *."

4. Section 12-35-170:

"The terms 'wholesale sale' and 'sale at wholesale' mean a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers for resale, and do not include a sale by wholesalers to users or consumers, not for resale."

5. Section 12-35-100:

"The term 'sale' includes:

(1) Any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. * * * ."

6. Section 12-35-550(1):

"There are exempted from the provisions of this article, and from the computation of the amount of the tax levied, assessed or payable under this article, the following:

(1) The gross proceeds of the sale of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

STATEMENT OF THE CASE

International Harvester Company is incorporated under the laws of Delaware and maintains its principal place of business in Illinois. Its business consists of selling parts, performing repair and service work and manufacturing and selling motor trucks with the sale of forty-eight motor trucks to Senn Trucking Company giving rise to the issues in this matter.

International manufactured the forty-eight trucks at issue at Fort Wayne, Indiana with the sale of such being negotiated in South Carolina by a resident salesman living in Mauldin, South Carolina. The operations of International in South Carolina consisted of branch offices located in Greenville and Charleston and two salesmen covering the state, as well as several independent franchised dealers. The branches and dealerships maintain inventories of trucks and parts and perform repair and service work.

The forty-eight trucks sold to Senn were picked up at Fort Wayne, Indiana by Sober Trucking, a common carrier, and all trucks were transported by Sober to International's branch in Greenville, South Carolina. International contracted with Sober and told the carrier what to deliver and where to deliver it. Likewise, the choosing of a specific trucking common carrier was left to International

and no control over the choice of Sober was exercised by Senn. The payment to Sober for the cost of transporting the trucks to the Greenville branch was paid by International and International included the freight charge on the sales invoice submitted to Senn.

The Greenville branch of International made delivery of the trucks to Senn and executed a Bill of Lading stating that possession was being transferred from International Harvester of Greenville to Senn. In many instances before delivery was made, the Greenville branch added equipment and performed service to prepare the trucks for delivery. Upon delivery of the trucks by the Greenville branch, Senn executed an affidavit on each truck stating that the trucks being delivered in South Carolina were to be transported from the state. After accepting delivery in Greenville, each truck was taken by Senn's drivers to Senn's Newberry terminal where they were prepared for being dispatched.

ARGUMENT SUMMARY

The issue which the petitioner seeks to raise is not a novel one. This Court has held on numerous occasions that no violation of the interstate commerce clause results where delivery occurs within the taxing state. McGoldrick v. Berwind-White Coal Mining Co., supra; International Harvester Co. v. Department of Treasury, supra and Utah Tax Commission v. Pacific States Pipe Co., 372 U. S. 605, 83 S. Ct. 925 (1963). Here the record shows that delivery occurred in South Carolina (see Appendix A-5 of Petition for Writ of Certiorari). Further, International negotiated the sale within the state by a resident salesman (see Appendix A-6 of Petition for Writ of Certiorari) and has business outlets within South Carolina (see Appendix A-5 of Petition for Writ of Certiorari). Such activities are sufficient for imposition of the tax without violating interstate commerce.

There is no conflict with this Court's decision in Complete Auto Transit, Inc. v. Brady, 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), since the tax is related to International's sales activities in South Carolina, is fairly apportioned since there is no risk of multiple taxation, is nondiscriminatory since all vendors, whether local or foreign, are treated alike and is related to the services provided by South Carolina since the contacts are for selling with South Carolina's services furthering such purpose. Complete Auto's four-prong test was properly applied in this case.

Further, state courts that have considered similar questions have reached the same conclusion as South Carolina. Both Cargo Carriers, Inc. v. Ragland, 646 S. W. 2d 681 (1980) and Pittsburgh & Midway Coal Mining Co. v. Revenue Division of New Mexico, 660 P. 2d 1027 (1983), applied the Complete Auto tests and found no violation of

interstate commerce by a sales tax. Since this matter involves applying established facts to familiar legal principles, no review by this Court is warranted.

ARGUMENT

The issue raised in this matter is the alleged violation of the Commerce Clause of the United States Constitution at Article 1, Section 8 by the imposition of a sales tax resulting from the sale of trucks. The trucks were physically delivered in South Carolina after such sales were negotiated by a resident South Carolina salesman of International Harvester. Such facts present no novel or special issue which warrants decision by this Court.

This Court should not grant the Petition sought since this matter has been resolved by this Court in prior opinions and by other state courts on prior occasions. Further, the result in the South Carolina Supreme Court is a correst result and does not conflict with the four criteria of Complete

Auto Transit, Inc. v. Brady, supra.

McGoldrick v. Berwind-White Coal Mining Co., supra, International Harvester Co. v. Department of Treasury, supra, and Utah Tax Commission v. Pacific States Pipe Co., supra, demonstrate that a sales tax does not violate interstate commerce where the sale by means of delivery takes place within the taxing state.

In McGoldrick, supra, New York City imposed a sales tax upon purchases of tangible personal property with the tax being two percent of the receipts of sales. Sale was defined to be any transfer of title or possession, or both. A Pennsylvania corporation sold coal to customers in New York City by means of a sales office in the city with delivery of the coal to be made in the city to the customer. In upholding the tax on such sales within New York, this Court held the taxable event was the transfer of possession within New York. In the instant case, possession was received in South Carolina.

The analysis used in McGoldrick, supra, was also applied in International Harvester Co. v. Department of Treasury, supra. In that case, Indiana imposed a gross income tax on sales made within the state where the buyer took delivery in Indiana even though the goods purchased may have been shipped from branches located outside Indiana, may have been sold to nonresidents, and the sales may have been solicited by a branch located outside Indiana. This Court held delivery within Indiana was an adequate taxable event and that a local transaction was being made the taxable event, which event was separate and distinct from the transportation which is interstate commerce.

This Court has held that the use of a purchased item outside of the taxing state does not raise a violation of the commerce clause. In Utah Tax Commission v. Pacific States Pipe Co., supra, a Nevada corporation manufactured in Utah cast-iron pipe and other products for

specific out-of-state jobs. Delivery was made and title passed to the purchaser at the taxpayer's foundry in the taxing state which was Utah. The purchaser then transported the materials in his own trucks to a predetermined out-of-state destination. This Court cited International Harvester, supra, as authority for the position that Utah could tax the sales since title passed and delivery was made in Utah despite the use of the pipe outside Utah.

There is no conflict between this Court's decision in Complete Auto Transit, Inc., supra, and the decision reached by the South Carolina Supreme Court in the instant case. Complete Auto Transit requires that before a tax which substantially affects interstate commerce may be imposed, such tax must be related to local activities, fairly apportioned, nondiscriminatory and fairly related to the services provided by the state. These tests are satisfied. First, the

petitioner has substantial activity connected with South Carolina to support a nexus to this State since it has retail sales licenses with facilities in Greenville and Charleston with resident sales agents in the state. Second, the tax is fairly apportioned since such test is aimed at preventing multiple taxation. In the instant case, only South Carolina may impose a sales tax since delivery may occur in only one state. Further, the record shows that in fact no other state has imposed a sales tax on the sales in dispute. Third, there is no discrimination since the tax is imposed on an equal rate to all sales transactions consummated within the state. All sales by local or out-of-state vendors are treated the same. Finally, the tax is in fair relation to services provided by South Carolina since the measure of the tax, the sales price, is reasonably related to the extent of the petitioner's contact with South Carolina. Commonwealth Edison v. State of Montana, 453 U. S. 609 (1981).

State courts that have considered the issue of the violation of the commerce clause by a sales tax have also reached the same result reached in the instant case. The Supreme Court of Arkansas in Cargo Carriers, Inc. v. Ragland, supra, found a sales tax proper on barges that may be operated in interstate commerce. Likewise, the Court of Appeals of New Mexico found that a gross receipts tax on the sale of coal did not violate the interstate commerce clause in Pittsburgh & Midway Coal Mining Co. v. Revenue Division of New Mexico, supra. Each case relied upon the four-prong analysis of Complete Auto, supra, and held no violation.

Since there is no conflict with Complete Auto Transit and since the decision of the South Carolina Supreme Court is in keeping with the numerous decisions of both this Court and other state courts, there is no basis for granting the

Petition for Writ of Certiorari.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 5, 1984

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of September, 1984, three copies of a Brief In Opposition To Petition For Writ of Certiorari were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Frank A. Graham, Jr., as Counsel of Record for the Petitioner, at Post Office Box 11864, Columbia, South Carolina, 29211.

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